They had not, and probably could not have touched the question of the ultimate right to compensation, without the repeal of the clauses on this subject in the Statute of 1842. In other words, the decision in the aerodrome case was wrong.

Where judicial reasoning is thus bent to the breaking point to bring about a result inconsistent with a precedent only four years old, the true significance is probably to be sought in the effect of external events on public opinion rather than in the law itself. Have the political events of the last few years completed the supremacy of Parliament over the relics of the prerogative, which is now frankly defined as implied executive power? [3] Or has the coming of peace, a successful peace, restored to the judiciary in England the calm necessary to enable it to review coldly the history of the exercise of a power, even a war-time power, and say, "Thus far shalt thou come, but no farther"? At all events, the constitutional significance of the court's struggle to bring the statutes and regulations into harmony with English tradition and English ideas of fair play is brought out by the fact that the result finally reached is in the spirit of our Fifth Amendment: "Nor shall private property be taken for public use without just compensation." The fundamental similarity between our constitutional law and that of England is not rendered any less striking by our own doubts as to the applicability of the Fifth Amendment to property actively used in the prosecution of a war.[4] This decision marks a return to the point of view of peacetime. May it not mean more — for example, that the tremendous impetus given to the power of the executive arm during the recent emergency is already suffering a check in favor of the older "Rule of Law"? *Inter arma silent leges* — but soon the platitude that all of the old English law books used to copy from the Institutes is rediscovered, that laws as well as arms are necessary for the glory of a sovereign.

HIRED MOTOR VEHICLES AND *RESPONDEAT SUPERIOR*. — For the purpose of establishing a liability on the ground of *respondeat superior*, shall the driver of a hired motor vehicle be deemed during that enterprise the servant of the owner or the servant of the hirer? It has often been suggested that the owner of the machine be held absolutely liable for injuries caused by the negligent operation of the machine [1] — the automobile being considered a dangerous instrumentality kept by the owner at his peril. But to-day it is fairly well settled that the automobile is not such a danger to mankind as to make absolute responsibility an incident of ownership.[2] If some one besides the negligent

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[3] [1919] 2 Ch. 216.

[4] See 30 HARV. L. REV. 673.

[1] See Ashley Cockrill, "The Family Automobile," 2 VA. L. REV. 189; 33 HARV. L. REV. 118; L. R. A. 1915 D, 691.

[2] "It may be that it would be wise and in the public interests that responsibility for an accident caused by an automobile should be affixed to the owner thereof, irrespective of the person driving it, but the law does not so provide." Cunningham *v.* Castle, 127 N. Y. App. Div. 580, 588, 111 N. Y. Supp. 1057, 1063 (1908). "It is not the ferocity of automobiles that is to be feared, but the ferocity of those who

operator is liable, the liability must be fixed on principles of the law of master and servant.[3]

Where a party hires a motor-car and drives it himself, the owner clearly is not responsible upon any principle of agency for negligent driving and consequent damage.[4] If the hirer furnishes his own driver, the former is the responsible principal.[5] On the other hand, where the hirer obtains both car and chauffeur from the owner, as in the case of the hiring of a taxicab, the latter is liable for the negligent driving of the automobile; indeed, it is usually the hirer [6] himself or another occupant [7] of the car who is seeking a recovery for injuries sustained. The hirer of a taxicab is often injured in a collision due to the combined negligence of the chauffeur and some other party, and the cases establish that the contributory negligence of the taxicab driver cannot be imputed to the hirer.[8] The soundness of these cases cannot be seriously questioned. The contract of hire is of comparatively brief duration, and the hirer exercises no substantial control over the operation of the car.

The chief difficulty is presented in those cases where vehicle and chauffeur are hired not for a brief trip, but upon a contract extending over a considerable period. In the case of *Finegan* v. *Piercy Contracting Co.*,[9] an appellate court of New York recently decided that the hirer was the master *pro hac vice*, and hence liable. A few days prior thereto, and apparently unknown to the Appellate Division, the New York Court of Appeals in the case of *McNamara* v. *Leipzig* [10] had decided that the hirer in such a situation was not the master. In the latter case the hirer was in the car when the accident occurred. In *Finegan* v. *Piercy Contracting Co.*, he was not present; hence, the Court of Ap-

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drive them. . . . There are times when these machines not only lack ferocity but assume such an indisposition to go that it taxes the limit of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evilly disposed mules and the like." Lewis *v.* Amorous, 3 Ga. App. 50, 55, 59 S. E. 338, 340 (1907). See also cases cited in 28 HARV. L. REV. 92, note 12.

[3] In this connection see the following cases, in which a chauffeur not acting in his master's business caused no liability on the part of his employer. Eakin *v.* Anderson, 169 Ky. 1, 183 S. W. 217 (1916); Hartnett *v.* Gryzmish, 218 Mass. 258, 105 N. E. 988 (1914); Brinkman *v.* Zuckerman, 192 Mich. 624, 159 N. W. 316 (1916); Soloman *v.* Trust Co., 256 Pa. St. 55, 100 Atl. 534 (1917), Steffen *v.* McNaughton, 142 Wis. 49, 124 N. W. 1016 (1910).

[4] Neubrand *v.* Kraft, 169 Ia. 444, 151 N. W. 455 (1915); Braverman *v.* Hart, 105 N. Y. Supp. 107 (1907).

[5] Hornstein *v.* Southern Boulevard Co., 79 N. Y. Misc. 34, 138 N. Y. Supp. 1080 (1913).

[6] Forbes *v.* Reinman, 112 Ark. 417, 166 S. W. 563 (1914); Meyers *v.* Tri-State Automobile Co., 121 Minn. 68, 140 N. W. 184 (1913); Wallace *v.* Keystone Automobile Co., 239 Pa. St. 110, 86 Atl. 699 (1913).

[7] Forbes *v.* Reinman, *supra;* Rodenburg *v.* Clinton Garage, 84 N. J. L. 545, 87 Atl. 71 (1913), aff'd 85 N. J. L. 729, 91 Atl. 1070 (1914); Gerretson *v.* Rambler Garage, 149 Wis. 528, 136 N. W. 186 (1912).

[8] Broussard *v.* Louisiana R. Co., 140 La. 517, 73 So. 606 (1916); Harding *v.* City of N. Y., 181 N. Y. App. Div. 251, 168 N. Y. Supp. 265 (1917).

[9] 178 N. Y. Supp. 785 (1919). For a statement of the facts in this case, see RECENT CASES, *infra*, p. 725.

[10] 125 N. E. 244 (N. Y. 1919), reversing 180 N. Y. App. Div. 515, 167 N. Y. Supp. 981. For a statement of the facts in this case, see RECENT CASES, *infra*, p. 725 (Three out of seven judges dissented).

peals case was, if anything, a stronger one for holding the hirer. It is hardly to be expected that *McNamara* v. *Leipzig* will establish any definite rule of law in New York. The question of who is the master is primarily one of fact; and when a rule of law must be applied to facts, distinctions crop up which in no small measure tend to confusion and apparent irreconcilability.[11] Of the many tests [12] which have been prescribed for determining which of two persons shall be deemed to be the master at a particular time, it seems that the most satisfactory is: "Whose work is being done, and who, during the course of that work, has or exercises control over the doing of that work?" [13] If the hirer has virtual control, he should be deemed the principal, even though the owner or general employer engages and pays the chauffeur. A transfer of control should *ipso facto* effect a transfer of responsibility.[14]

An injured plaintiff, in view of conflicting decisions, will find it perplexing to determine just which of the two employers will be considered by the court or jury the master in the course of whose employment the injury occurred.[15] The plaintiff can no doubt allege a joint liability,[16] but it is clear that the two parties are not jointly liable. The situation suggests the advisability of statutes modifying the rigidity of common-law procedure by allowing a suit in the alternative.[17] The plaintiff

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[11] "The decisions as to the liability of parties hiring vehicles . . . are exceedingly close, and it is difficult to distinguish between the facts upon which diverse judgments have been founded." Waldman *v.* Picker Bros., 140 N. Y. Supp. 1019 (1912). In this case the hirer was not held liable. But in De Perri *v.* Motor Haulage Co., 185 N. Y. App. Div. 384, 173 N. Y. Supp. 189 (1918), and in Diamond *v.* Sternberg Truck Co., 87 N. Y. Misc. 305, 149 N. Y. Supp. 1000 (1914), the owner was not held liable. Query whether the holding of one party not liable would lead the court to hold that the other party was liable.

[12] See 2 MECHEM, AGENCY, 2 ed., § 1863; WOOD, MASTER AND SERVANT, 2 ed., § 317; 1 LABATT, MASTER AND SERVANT, 2 ed., §§ 52–62.

[13] See McNamara *v.* Leipzig, 180 N. Y. App. Div. 515, 520, 167 N. Y. Supp. 981, 985. On this question see the oft-quoted test laid down by Moody, J., in Standard Oil Co. *v.* Anderson, 212 U. S. 215, 221 (1909), which was a case of hiring a hoisting machine and stevedore; in concluding the learned justice says: "To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary coöperation, where the work furnished is part of a larger undertaking."

[14] "The respondents in the course of business had transferred the vehicle and driver to the control of the hirer, who alone could say where and in what the work of the truck should thereafter consist, and if this effected a transfer of control it must, ipso facto, have effected a transfer of responsibility." Olson *v.* Veness, 178 Pac. 822 (Wash. 1919). In this case the owner of a motor-truck who furnished both vehicle and driver to a hirer was not held liable for the driver's negligence.

[15] As an example of the problem before the plaintiff, see Pease *v.* Montgomery, 111 Me. 582, 88 Atl. 973 (1913), in connection with Pease *v.* Gardner *et al.*, 113 Me. 264, 93 Atl. 550 (1915). See also Frerker *v.* Nicholson, 41 Colo. 12, 92 Pac. 224 (1907), and Nicholson *v.* McGovern Undertaking Co., 41 Colo. 1, 92 Pac. 225 (1907).

[16] Finegan *v.* Piercy Contracting Co. *et al.*, *supra;* Thorn *v.* Clark, *et al.*, 188 App. Div. 411, 177 N. Y. Supp. 201 (1919); Neubrand *v.* Kraft, *et al.*, *supra.* For a case where the two suits were tried together, see Tornroos *v.* R. H. White Co., Same *v.* Autocar Co., 220 Mass. 336, 107 N. E. 1015 (1915).

[17] As to joinder of defendants in the alternative, see 51 L. R. A. (N. S.) 640; 31 HARV. L. REV. 1034. For the English Statute, see THE ANNUAL PRACTICE, 1916,

should be permitted to allege directly that one of the two defendants — the owner or the hirer — is the party answerable to him on the ground of *respondeat superior*, and that he submits it to the court or jury to determine which.

THE APPLICATION OF BULK SALES STATUTES. — Since 1901 over forty states have passed statutes to the general effect that a sale in bulk of a large part or the whole of a stock of merchandise shall be void as against creditors of the vendor, unless the parties have complied with rather elaborate requirements in the way of giving notice. These statutes are not uniform,[1] and some were at first held unconstitutional;[2] but they are now almost[3] unanimously considered valid.[4] Yet in the construction of these statutes it is noticeable that the courts are by no means agreed. Thus the recent case of *Swift & Co.* v. *Tempelos*[5] held that the North Carolina statute did not apply to the sale of a restaurant together with the goods and fixtures therein, while under the Washington statute the contrary was decided.[6] Again, apparently a statute including "fixtures pertaining to the business" does not apply to the sale by a retail coal dealer of his coal bags, wagons, and safe,[7] while a statute not including fixtures does apply to the sale of a soda fountain by a retail druggist.[8] There is also a conflict over the meaning of the words "shall be presumed fraudulent and void," some courts holding that a rule of substantive law is thus established,[9] while others regard

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Rules, Order XVI. See also Rule 8 of the NEW JERSEY PRACTICE ACT (1912). Suits in the alternative are suggested in the PROPOSED SIMPLIFICATION OF THE NEW YORK CODE (1919), p. 12.

[1] For a summary of the different forms, see L. R. A. 1915 E, 917.

[2] Wright *v.* Hart, 182 N. Y. 330, 75 N. E. 404 (1905); Off *v.* Morehead, 235 Ill. 40, 85 N. E. 264 (1908); McKinster *v.* Sager, 163 Ind. 671, 72 N. E. 854 (1904); Block *v.* Schwarz, 27 Utah, 387, 76 Pac. 22 (1904); Miller *v.* Crawford, 70 Ohio St. 207, 71 N. E. 631 (1904).

[3] The Utah statute made a sale without the required notice a misdemeanor, and no new statute has been passed. In Ohio the original statute was changed to make the sale only presumptively fraudulent instead of void, but was still held unconstitutional. Williams *v.* Preslo, 84 Ohio St. 328, 95 N. E. 900 (1911).

[4] In some states, changes pursuant to the expressed opinion of the courts were made in the statutes, which were thereafter declared constitutional. Sprintz *v.* Saxton, 126 App. Div. 421, 110 N. Y. Supp. 585 (1908); Johnson Co. *v.* Beloosky, 263 Ill. 363, 105 N. E. 287 (1914); Hirth-Krause Co. *v.* Cohen, 177 Ind. 1, 97 N. E. 1 (1912). In others the statutes in their original forms have been held constitutional. Kidd, D. & P. Co. *v.* Musselman Grocer Co., 217 U. S. 461 (1910); Young *v.* Lemieux, 79 Conn. 434, 65 Atl. 436 (1907); Lemieux *v.* Young, 211 U. S. 489; McGray *v.* Woodbury, 110 Me. 163, 85 Atl. 491 (1912); Squire *v.* Tellier, 185 Mass. 18, 69 N. E. 312 (1904); Kett *v.* Masker, 86 N. J. L. 97, 90 Atl. 243 (1914); Neas *v.* Borches, 109 Tenn. 398, 71 S. W. 50 (1902).

[5] 101 S. E. 8 (N. C.). See RECENT CASES, p. 731, *infra*.

[6] Plass *v.* Morgan, 36 Wash. 160, 78 Pac. 784 (1904). The Washington statute, however, reads, "the sale of *any* stock of merchandise."

[7] Bowen *v.* Quigley, 165 Mich. 337, 130 N. W. 690 (1911).

[8] Young *v.* Lemieux, *supra*. But see *contra*, Lee *v.* Gillen, 90 Neb. 730, 134 N. W. 278 (1912).

[9] Moore Dry Goods Co. *v.* Rowe, 97 Miss. 775, 53 So. 626 (1910); Daly *v.* Sumpter Drug Co., 127 Tenn. 412, 155 S. W. 167.